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No. _____

In The

Supreme Court of the United States

HANS-HENNING STIER,

Cross-Petitioner,

vs.

READING & BATES CORPORATION and
READING & BATES DRILLING CO.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an injured employee who is an alien offshore worker foreclosed by statutory construction or federal preemption from suing his employer on state law claims in a state court lawsuit after he has been unsuccessful in that lawsuit in stating a claim for relief under the Jones Act or under any other U.S. maritime law because of the Jones Act's exclusionary provision applicable to alien offshore workers (46 U.S.C.App. §688(b)), which states that no action may be maintained under the Jones Act or any other maritime law of the United States by such workers?

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioner prays for a writ of certiorari issue to review the judgment in part of the Texas Supreme Court entered on April 8, 1999, the writ to issue only in the event that this Court grants the petition for writ of certiorari in No. 99-558.

OPINIONS BELOW

The opinion of the Supreme Court of Texas (App. 1-32 in the opening petition)[1] is reported at 992 S.W.2d 423. The order of the Supreme Court of Texas denying motions for rehearing filed by both Stier and Reading & Bates (App. 41) are reported at 42 Tex.Sup.Ct.J. 848. The opinion of the Fourteenth Court of Appeals of Texas (App. 33) is unreported. The judgment of the district court of Harris County, Texas (App. 39) is unreported.

STATEMENT OF JURISDICTION

This is a cross-petition filed pursuant to Rule 12.5. The opening petition for certiorari was placed on the docket in this Court on September 30, 1999. This cross-petition is being filed not more than thirty days after such docketing. The judgment of the Supreme Court of Texas was entered on April 8, 1999. App. 1. The timely filed

[1] Under Rule 12.5, cross-petitioner relies on the appendix in the opening petition. All reference to appendix herein are to the appendix in the opening petition.

petition for rehearing of Stier was denied on July 1, 1999. App. 41.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(a) if this Court has jurisdiction over the opening petition. The judgment of the Supreme Court of Texas affirmed the trial court's judgment dismissing Stier's claims based on Texas law. It, however, reversed the trial court's judgment dismissing the claims based on foreign law and remanded those claims for further pre-trial proceedings and a trial on the merits. In *Jefferson v. City of Tarrant*, 118 S.Ct. 481, 486-87 (1997), this Court rejected jurisdiction where as here the petition "presents the typical situation in which the state courts have resolved some but not all of the petitioners' claims." This Court stated that: "Our jurisdiction therefore founders on the rule that a state-court decision is not final unless and until it has effectively determined the entire litigation." *Id.* at 487.

STATUTE INVOLVED

Section 688, 46 U.S.C.App., the Jones Act, provides that:

> **§688. Recovery for injury to or death of seaman.**
>
> (a) Application of railway employee statutes; jurisdiction.
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such

action all statutes of the United States modifying or extending the common-law right of remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred –

> (A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources – including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted

primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person –

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

STATEMENT OF THE CASE

Hans-Henning Stier, a 17½ year employee of Houston-based Reading & Bates brought this personal injury case against his employers to recover for their negligence which resulted in permanent cervical spine injuries. While doing his job as a mechanic on the George H. Galloway, a mobile, self-elevating jack-up drilling platform rig on April 18, 1992, Stier was hit in the head by a barrel hook on the end of a hoist being operated by another employee. The accident was reported to the U.S. Coast Guard on form CG-2692 by Reading & Bates'

Houston office giving Reading & Bates' Houston office as the address and telephone number of the operating company. The report says that the operation that Stier was involved in at the time of the injury was not in the operational procedures but would be addressed in the procedures currently in production in the Houston office. At the time of the injury the rig had been docked for four months at the Chaguaramas Terminals in the waters of Trinidad while awaiting a new contract. Shortly after the injury, the rig traveled to Venezuelan waters to work under a new contract and later to the Gulf of Mexico for work under another contract.

Stier is a German Citizen who resided in Germany when he was not on a tour of duty on a rig until he made Rio De Janeiro, Brazil his place of residence in about 1984 after having worked off the coast of Brazil on a prior assignment for Reading & Bates. During Stier's employment with Reading & Bates, the only locus of his employment was Reading & Bates' Houston office. Stier communicated by mail and telephone on a regular basis with the Houston office and he visited the Houston office on various occasions. He had at times been brought to the U.S. to undergo training. He was paid by the Houston office sending his salary to Stier's account at either a Houston bank or a Miami bank. A manager in the Houston office was Stier's superior and he received a written report of the accident. The manager's job required that he have personal knowledge of the rig's location and activities. Stier's employment contract was signed in and governed by Texas law and specified Stier's assignment as Argentina and Trinidad. Under previous contracts beginning in 1971, Stier's areas of assignment

had been in the waters of Africa, South America and the Carribean. When Stier was injured he was evacuated by air ambulance to a hospital in Miami and later was brought by Reading & Bates to Houston for treatment.

Stier's complaint asserted claims under the Jones Act and the general maritime laws, and separately under Texas law and alternatively under Trinidad law. The state trial court granted Reading & Bates' motion for summary judgment dismissing all claims on the grounds that they were preempted by 46 U.S.C.App. §688(b). Stier appealed the dismissal of the state law and foreign law claims. The Texas Court of Appeals affirmed. A divided Texas Supreme Court affirmed the dismissal of the Texas law claims but reversed the dismissal of the foreign law claims and remanded those claims for further pre-trial proceedings and trial on the merits. Three judges dissented from the dismissal of Stier's Texas law claims.

The majority found that the 1982 Amendment to the Jones Act provided unambiguously that alien offshore workers have no claim for relief under the federal maritime laws. App. 7. It reviewed the caselaw existing at the time of the 1982 Amendment, its legislative history and the law of maritime preemption. App. 8-11. The majority found implied maritime preemption based entirely on cryptic remarks in a Committee report about U.S. courts not entertaining alien worker lawsuits. In its view, Congress had prescribed a comprehensive tort recovery regime for alien offshore workers and state law claims would conflict with that regime. "In the case before us, there is a comprehensive tort recovery regime in place that governs claims such as the one Stier asserts." App. 17. The majority also found that Stier's Texas law

employment agreement did not alter its holding. App. 24. The Court therefore affirmed the judgment dismissing the state laws claims. As to the foreign law claims, the majority, however, held that they were not preempted. App. 26. Since foreign law claims were recognized as a remedy for alien workers, the only issue then was one of venue or forum non conveniens and since state courts may apply their own procedural rules in that area, there was no conflict with federal maritime laws in a state court entertaining such claims. App. 26. The Court therefore reversed the judgment dismissing the foreign law claims. App. 26.

The three-judge dissent stated that the plain meaning of Section 688(b) was that alien offshore workers had no federal maritime law claims. "If federal maritime law does not apply or is unavailable, federal maritime law cannot preempt whatever state law might apply." App. 30-31. State and foreign law claims were outside the scope of the exclusionary provision. "The Court reaches the result it wants by avoiding a plain reading of the statute." App. 27. The "sparse and confusing" legislative history does not support the majority's holding. Since alien workers have no remedy under the federal maritime laws, Congress has not prescribed a comprehensive tort recovery regime for them. The dissent would hold that Stier is free to pursue any state or foreign law claims under state procedural rules. App. 31.

REASONS FOR GRANTING THE WRIT

The Texas Supreme Court's decision – that the Jones Act's exclusionary provision for alien offshore workers, 46 U.S.C.App. §688(b), which says that such workers have no claim for relief against their employer under the Jones Act or any other federal maritime laws, displaces state law claims by implication – conflicts with decisions of this Court and Courts of Appeals on an important matter of interpretation of the Jones Act, and as to the scope of federal preemption, and this question of federal law has not been but should be settled by this Court. The Court below, however, reached the correct result in holding that foreign law claims were not preempted or foreclosed. Cross-Petitioner believes that there is a lack of finality for this Court to have jurisdiction to review the decision of the Texas Supreme Court. However, if this Court should find that this controversy comes within one of those categories of cases allowing it to find finality despite further proceedings in the lower state courts and grants the petition in No. 99-558, we believe the Court should have the entire controversy before it and should grant this cross-petition as well.

A. State Law Claims Are Not Displaced by the Plain Meaning of the Jones Act's Section 688(b) and That Plain Meaning Is Coherent and Consistent with Both the Statutory Scheme of the Jones Act and the Primary Purpose and Objective of Congress in Enacting the 1982 Amendment

The 1982 Amendment of the Jones Act, Section 688(b), 46 U.S.C.App., which takes away any claim for relief that alien offshore workers might have against their employer

under any federal maritime law, does not preclude those alien workers from suing their employer or others in state court on the basis of state law or foreign law.

1. The Decision of the Court Below Is Erroneous in Part

The Texas Supreme Court held that state law claims are impliedly preempted by Section 688(b). App. 1. The Court, however, reached the correct result in holding that the foreign law claims were not preempted or foreclosed. App. 26. As to the state law claims, the Court did not hold that the original Jones Act itself or other substantive U.S. maritime law preempted state claims. Rather the preemption came only from the implications of Section 688(b) when viewed with cryptic remarks in a Committee report about U.S. courts not entertaining lawsuits by alien workers. Since the implied preemption came from Section 688(b)'s exclusionary provision itself, and not from the substantive maritime law, the only issue was one of statutory construction. The Court below, however, erroneously relied upon the maritime preemption doctrine to fortify its faulty analysis. This confusion led the Court to an illogical conclusion. Stier was unsuccessful in invoking any federal maritime law and he never had any claim for relief under any federal maritime law yet the Court below illogically held that Section 688(b) by the maritime preemption doctrine preempted his state law claims.[2]

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[2] The only other state appellate court to decide this issue was the intermediate appellate courts of Louisiana, which have

2. The Jones Act and The 1982 Amendment

Prior to the 1982 Amendment, the Jones Act, 46 U.S.C.App. §688, consisted of what is now Section 688(a). The original Jones Act created a federal statutory remedy for "any seamen" against their employer for the negligence of the employer or his agents based on statutory and common law applicable to railway employees and conferred jurisdiction without invoking federal admiralty jurisdiction. The Jones Act is "remedial legislation for the benefit and protection of seamen" and "has been liberally construed to attain that end." *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939). In *Lauritzen v. Larsen*, 345 U.S. 571, 578, 583 (1953), this Court held that not "any seamen" could invoke the Jones Act but that the claims under the Jones Act must have some nexus with the interests of the United States and the Court established criteria to determine if subject matter jurisdiction exists under the Jones Act.[3] Under the Saving to Suitor's clause, state courts could exercise subject matter jurisdiction over such actions as well as claims arising under other U.S.

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held that state law claims are preempted, the Louisiana Supreme Court has declined to grant review. *See, e.g., Coto v. J. Ray McDermott*, 709 So.2d 1023, 1029 (La. App. 1998), *review denied*, 726 So.2d 904 (La. 1998), *cert. denied*, 119 S.Ct. 1356 (1999).

[3] *See* Allbritton, *Choice of Law in a Maritime Personal Injury Setting: The Domestic Jurisprudence*, 43 La.L.Rev. 879, 895, 907, 909 (1983) (discusses cases set in the offshore oil setting, the author states that where the offshore worker is a "third country national" the choice of law issue is more complicated and that factor alone argues in favor of rejecting any forum non conveniens challenge in a U.S. court).

maritime laws. If a case comes within admiralty and maritime jurisdiction, the state court by the so-called "reverse-Erie" doctrine is required to conform the substantive remedies afforded to governing federal maritime standards. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986). *See also* Robertson, *Admiralty & Maritime Litigation in State Court*, 55 La.L.Rev. 685, 700 (1995).

Subsection 688(b), added by the 1982 Amendment, says that offshore workers have no seamen claim for relief against their employer under the federal maritime laws. Specifically, Section 688(b)(1) and (2) states in relevant part (paraphrased in part for brevity):

> (1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident of the United States . . . if the incident occurred – (A) while . . . in the employ of an enterprise engaged in the exploration . . . of offshore mineral or energy resources . . . and (B) in the territorial waters . . . of a nation other than the United States . . .
>
> (2) [Unless] the person bringing the action establishes that no remedy was available to the person [under the laws of the nation asserting jurisdiction over the place of the injury or the nation where the person was a citizen or resided].

Subsection 688(b)(1) says that alien workers have no seamen claim against their employer under the Jones Act or any other U.S. maritime law. Alien workers simply do not

have a maritime law case of any kind. Subsection 688(b)(2) does not change anything as it is a meaningless provision. It is inconceivable that alien workers would not have some kind of a remedy for an injury by the country having jurisdiction over the place where the injury occurred. *See* H.R. Rep. 97-863, 97th Cong., 2d Sess. 5-6 (1982), App. 53 ("it seems unlikely that a foreign worker would not have a remedy. . . . "). There are no reported cases discussing Subsection (b)(2) probably because the Committee report made it clear that inadequacy of the local remedy does not make the remedy nonexistent. *Id.* at 6, App. 52-53 ("The United States should not sit in judgment as to the adequacy of such foreign remedies."). If the worker can recover nominal compensation, there is a remedy. The Texas Supreme Court focused on Subsection (b)(2) and let it define for that court the meaning of the entire Subsection (b). App. 7, 20. By saying that alien workers have a remedy under the Jones Act and other maritime laws if they have no other remedy the Court implicitly found that an alien worker was (theoretically) able to invoke the Jones Act and (apparently) therefore there was a (possible) comprehensive tort recovery regime applicable to alien workers. App. 17.

Section 688(b) does not say that federal or state courts shall not entertain lawsuits by alien workers. That would encroach on the state court's right to establish procedural rules of venue and forum non conveniens. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1946); *American Dredging Co. v. Miller*, 510 U.S. 443, 445 (1994).

3. The Primary Purpose and Objective of Congress

The primary purpose and objective of Congress in enacting the 1982 Amendment as ascertained from the plain terms of the statute and viewed in context with the original Jones Act was to exclude alien offshore workers from having a claim against their employer under U.S. maritime laws. That primary purpose and objective is also consistent with the legislative history. The Committee found that the foreign offshore petroleum industry was not suggestive of traditional maritime affairs and alien offshore workers did not come within the traditional concept of seamen but rather more closely resembled foreign land-based workers who never left the jurisdiction of the country of their citizenship. *See* H.R. Rep. 97-863, at 2-4, App. 44-50. *See also Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 421 (1985).

The Fifth Circuit in *Vaz Borralho v. Keydril Co.*, 710 F.2d 207, 210 (5th Cir. 1983), found that the legislative history of the 1982 Amendment (Section 688(b)) was "sparse and confusing." In scholarly commentary the authors discussed the 1982 Amendment stating that "this provision takes away substantive causes of action but says nothing about the jurisdiction of United States courts." Robertson & Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 Tex.L.Rev. 937, 947 n.56 (1990). It is further stated that:

> The legislative history, however, contains scattered statements characterizing the provision as designed to close United States courts to foreign offshore worker litigation. . . . These statements are not consistent with the provision's language.

Id. The assumption behind those scattered statements was, as the Committee repeatedly stated throughout the report, the alien offshore workers never left the area where they lived and they "lack sufficient contacts with the United States" and the only claims they could in theory have were against their employer under the Jones Act and U.S. maritime law. *See* H.R. Rep. 97-863, at 4, 7, App. 48, 55. They had no relationship to a U.S. state for that state to provide a forum and a remedy. Based only on these "scattered statements" the Texas Supreme Court held that there was implied preemption of state law. App. 1, 10. Not only are these "scattered statements" contrary to the plain meaning of Subsection 688(b) but they are contrary to the primary purpose and objective of Congress in enacting the 1982 Amendment and they are contrary to the overall statutory scheme.

If the legislative history is to be considered, the Committee report under the heading "Scope of the Legislation" specifically considered which claims were foreclosed by Section 688(b): "The legislation applies only to tort remedies provided in Section 33 of the Jones Act and under the maritime laws of the United States. . . . " H.R. Rep. 97-863, at 4, App. 50. It further stated that the legislation had no impact on contractual and other types of actions which have a relationship to offshore operations. *Id.* It said nothing about state law.

The Fifth Circuit in *Vaz Borralho, supra,* 710 F.2d at 211, quoted the Committee sponsor of the 1982 Amendment as stating that:

> I emphasize that this legislation does not usurp a legitimate court prerogative. But, rather,

> it codifies the precedents already established by the courts.

710 F.2d at 211. A state court providing a state law remedy to an alien worker who had significant contacts within that state is an obvious legitimate court prerogative. The Committee report also stated that:

> The courts have generally found that the substantive rights granted by the Jones Act do not extend to foreign nationals who lack sufficient contacts with the United States. These court decisions are not a denial of equal access but rather a determination of lack of standing. The decisions generally hold that the litigant has no right which can be enforced in a U.S. court. H.R. 4863 codifies this case law and clarifies that the substantive rights granted by the Jones Act do not extend to foreign offshore workers.

H.R. Rep. No. 97-863, at 7 (1982), App. 55. Under the heading "Constitutional Issues" the Committee recognized that the legislation's treatment of foreign nationals could infringe the equal protection clause if it created an irrational classification system. *Id.* at 8, App. 56-57. The different treatment between foreign nationals and U.S. residents was justified on the basis of the lack of contacts the foreign nationals had with the United States as opposed to their significant contacts with the foreign nation whose waters the offshore activities were being pursued. *Id.*

The constitutional issue discussion reveals that the Committee concluded that there was no constitutional issue because the workers caught by Subsection 688(b) lacked significant contacts with the United States and,

further, they had such contacts with the foreign nation where the injury occurred so that the interests of that sovereign predominated in the matter. The amendment was not intended to impact workers with significant contacts with the United States. If the workers had significant contacts with a state there would then be a state law and constitutional due process basis for the application of state law. Congress could not have intended that the reach of the 1982 Amendment would impact state law claims by a worker with significant contacts within a state. The entire concern of the legislation was foreign workers without sufficient contacts with the United States mis-using the Jones Act. It is an improper use of this legislation to apply it to an alien worker with significant contacts with a U.S. state, suing in that state based on those contacts and seeking redress on a claim arising out of a long-term employment relationship between the worker and his employer whose operations are centered in that state and where the employment relationship was centered in that state. There is no federal substantive policy with which state law conflicts. In the absence of a clear conflict, state law should apply.

4. The Plain Meaning of Section 688(b) Is to Be Enforced and That Meaning Is Coherent and Consistent with the Statutory Framework

"A statute's plain meaning must be enforced. . . ." *United States Nat'l Bank v. Independent Ins. Agents*, 508 U.S. 439, 454 (1993). *See United Services Automobile Ass'n v. Perry*, 102 F.3d 144, 146 (5th Cir. 1996) (the Court is to "give effect to the unambiguously expressed intent of

Congress."). The Court's "inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 846 (1997). "We must give effect to this language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992). Congress' intent is to be discerned from the language of the statute itself and the statutory framework surrounding it. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286 (1995). If the court finds the statute ambiguous, it may then consider legislative history. *See Perry, supra*, 102 F.3d at 1446. However, the legislative history should not be used to rewrite the plain terms of a statute. *See Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991). A committee report carries little weight in the face of the actual language of the statute. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520 (1992). As this Court stated in *Cipollone* in rejecting a statement in a Committee report as not indicative of Congressional intent because it "is incompatible with the language and origins of the amendments." The Court stated that "inferences from legislative history cannot rest on so slender a reed." *Id.* at 520. "[I]n other enactments Congress has explicitly referred to state common law when it meant to include it within the scope of a preemption clause." *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246, 250 (Tex.), *cert. denied*, 513 U.S. 1057 (1994). The Court in *Moore* gave a number of examples where Congress had displaced state law by stating in the federal law that state

law was displaced. *Id.* When Congress expressly identified what claims are foreclosed, as a matter of statutory construction under the principle of *expressio unius est exclusio alterius*, it can be assumed that Congress did not intend to reach claims that were not identified. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995). Further, "*Cipollone* supports an inference that an express preemption clause forecloses implied preemption. . . . " *Id.* at 288. Section 688(b) says alien workers have no claim under the Jones Act "or under any other maritime law of the United States. . . . " It does not say anything about state law or foreign law claims being heard in a state court. It is not a venue or forum non conveniens statute.

This Court stated the first principle in ascertaining if state law is displaced as follows: "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). As in *Lohr*, where this Court held that state law was not preempted, "if Congress intended to preclude [state] common-law causes of action, it chose a singularly odd word [or phrase] with which to do it." *Id.* at 487. In a similar situation, this Court held in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), that the argument that state law stood as an obstacle to FIFRA's goal, which was argued to be that of comprehensive regulatory statute, was a technical argument based on little more than snippets of legislative history and policy speculations. As to the legislative history this Court's statements apply equally here:

> The concurrence further contends that the Senate Agriculture Committee unequivocally

> expressed its view that §136v should be read to deprive localities of regulatory authority over pesticide. This may be true, but it is hardly dispositive. Even if §136v were sufficiently ambiguous to justify reliance on legislative history, the meaning a committee puts forward must at a minimum be within the realm of meanings that the provision, fairly read, could bear. Here, the Report clearly states that §136v should be read as a prohibition, but it is just as clear that the provision is written exclusively in terms of a grant. No matter how clearly its report purports to do so, a committee of Congress cannot take language that could only cover 'flies or mosquitoes' and tell the courts that it really covers 'ducks'.

501 U.S. at 610 n.4. Section 688(b) is not ambiguous so that the legislative history is irrelevant. However, even if it were to be considered, the "scattered statements" characterizing the 1982 Amendment as closing U.S. courts to foreign offshore workers was based on the assumption that they could have no other claims to bring in a U.S. court and in any event it is not the overriding purpose and objective of the legislation as can be seen by the whole of the Committee report. It is not "at a minimum . . . within the realm of meanings that the provision, fairly read, could bear." Section 688(b) takes away all federal maritime claims of alien workers. It does not say that U.S. courts, federal and state, cannot entertain lawsuits by alien workers. To paraphrase *Mortier*, it says flies and mosquitoes, it does not say ducks. Venue and claims for relief are different concepts.

This Court's statement in *Cipollone* fits the situation here. "In this case there is no 'good reason to believe' that

Congress meant less than what it said; indeed, in light of the narrowness of the 1965 Act, there is 'good reason to believe' that Congress meant precisely what it said in amending that Act." 505 U.S. at 522. Congress' intent from the language of the statute itself and its surrounding statutory framework is clear. The Jones Act provides remedies to seamen with sufficient nexus with the interests of the United States. The 1982 Amendment removed alien offshore workers from the Jones Act and from having a claim against their employers under any other U.S. maritime law. It is not a venue statute. It has no effect on state law claims brought in state court. If the legislative history is considered that history is consistent with the statutory framework. When Congress enacted the 1982 Amendment it was primarily concerned with the Jones Act being mis-used by alien offshore workers in suits against their employers who Congress saw as not legitimate seamen and who were not engaged in legitimate maritime activities but rather were engaged in essentially land-based type activities near their home.

5. Alien Workers Cannot Invoke the Jones Act or Any Other U.S. Maritime Law and in State Court Lawsuits Rules of Venue and Forum Non Conveniens Are Left to State Procedural Law

The starting point of any determination of whether or not a federal law displaces state law claims is the obvious question of whether or not the federal law is invoked on the facts presented. It is only when admiralty and maritime law is invoked and is applicable to the case at hand can the federal maritime substantive law displace state laws. *See Executive Jet Aviation, Inc. v. City of Cleveland*, 409

U.S. 249, 273 (1972); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 227 (1986) ("to the extent Congress provided a federal remedy . . . , federal substantive law would clearly have pre-empted conflicting state" law). There can be no conflict if the federal law is not invoked or is inapplicable to the facts.

Subsection 688(b) says that the alien offshore worker has no claim for relief against their employer under the federal maritime laws so that the Court does not have federal admiralty and maritime jurisdiction over the case. *See Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1377 (5th Cir. 1988). Under established principles when a litigant could not state a claim for relief under the federal maritime laws that litigant was free to proceed in state court under state law or foreign law. *See Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 273 (1972). In *Executive Jet Aviation*, this Court dealt with an aviation accident in navigable waters. It was stated that the determination of the question of whether a tort is "maritime" and within the admiralty jurisdiction has traditionally depended upon the place of the wrong. If the wrong occurred on navigable waters, the action is within admiralty jurisdiction. Federal maritime law governs only those torts occurring on the navigable waters of the United States. *Id.* at 254. This Court stated that the nontraditional situations occurring over navigable waters have created problems with the locality test of maritime tort jurisdiction. *Id.* at 255. In *Executive Jet Aviation* this Court held in the context of federal court litigation that because the plaintiff had no claim for relief under federal admiralty and maritime jurisdiction and there was no

diversity of citizenship the state court had jurisdiction to apply state law to the tort claim. *Id.* at 273.

In other areas Congress has found that offshore oil exploration is not within admiralty and maritime jurisdiction and special rules have been assigned to injured workers resulting in the application of state law. *See* Outer Continental Shelf Lands Act, 46 U.S.C. §1331. In *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 361-66 (1969), this Court held that the admiralty and maritime jurisdiction did not apply to a fixed offshore oil-drilling rig on the outer continental shelf. Because of the workers' relationship to the adjoining state, state law was considered the proper rule of law. *Id.* at 363, 365. In *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), this Court rejected LHWC Act coverage for a worker on a fixed oil-drilling platform offshore in state waters, holding that offshore exploration was not a maritime activity.

Directly on point to the issue at hand is *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988). In *Camejo*, the widow of an alien worker sued in state court (which was removed to federal district court) for claims based on the Jones Act, general maritime law and Texas law. The Fifth Circuit held that because Section 688(b) applied, the widow could not state a claim for relief under any federal maritime law. *Id.* at 1377. The Court also held that although no federal admiralty and maritime claim remained in the case, the district court retained pendent jurisdiction over the state claims. *Id.* The district court applied federal forum non conveniens and held that the United States was not a proper forum. The Court affirmed the refusal to remand the case to state court for the forum non conveniens determination as to

the state law claim because under controlling law at that time such a determination would be the same in either court. *Id.*

Stier never invoked the Jones Act and the federal general maritime laws. He was unable to state a claim for relief under those laws. The court never had federal admiralty and maritime jurisdiction over any federal maritime claim. Therefore, Stier could sue in state court on state law claims or foreign law claims. *See Executive Jet Aviation, supra,* 409 U.S. at 273. In a state court action in which a litigant unsuccessfully sought to invoke federal law as to some claims, the issue of whether or not other state law claims can be tried in state court is an issue of venue. Issues of venue have been uniformly left to state court. *See Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 504 (1946). *See also Exxon Corp. v. Choo,* 881 S.W.2d 301 (Tex. 1994). This Court made that abundantly clear in maritime cases in *American Dredging Co. v. Miller,* 510 U.S. 443, 453 (1994):

> Just as state courts, in deciding admiralty cases, are not bound by the venue requirements set forth for federal courts in the United States Code, so also they are not bound by the federal common-law venue rule (so to speak) of forum non conveniens.

Thus, there is no conflict between federal substantive law and Texas law. The issue of whether or not Stier can sue in a Texas court based on state law or foreign law is a matter only for state procedural law.

6. The Maritime Preemption Doctrine Is Not Applicable Because There Was No Claim for Relief Under Any Federal Maritime Law and in Any Event There Is No Preemption of State Law Claims

Both the maritime preemption doctrine employed by the Court below and its application to the facts at hand were erroneous. The decision below runs counter to "the recent trend moving steadily in the direction of upholding state law." Robertson, *Applicability of State Law in Maritime Cases After Yamaha Motor Corp. v. Calhoun*, 21 Tul.Mar.L.J. 81, 96 (1996). *See* Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J.Mar.L.& Comm. 325, 363 (1995).

Under the federal maritime law there is no tradition or principle of displacement of state law where the federal maritime laws are not invoked and the litigant does not have a claim for relief under those laws. The maritime preemption doctrine is simply not applicable in such a situation. In any event, there is no preemption of state law claims. In *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 629 (3d Cir. 1994), *aff'd*, 516 U.S. 199 (1996), Chief Judge Becker stated the principle as follows: "In our view, however, the maritime preemption doctrine is not significantly different from the preemption doctrine applicable to non-maritime contexts." *See* Robertson, *supra*, 21 Tul.Mar.L.J. at 89, 99. In maritime cases and in non-maritime cases the issue is the same: whether or not the federal law would be frustrated by the application of state law. *See Calhoun, supra*, 40 F.3d at 630. There is a conflict when state law stands as an obstacle to the accomplishment of the primary purpose and objective of

Congress. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 289-90 (1995). There is a presumption against implied preemption of state law. *See Calhoun, supra*, 40 F.3d 630. In *Calhoun* federal maritime law was invoked but there was no suitable remedy prescribed for the injury. That case involved the accidental death of a non-seaman in a boating accident in the waters of Puerto Rico. The Third Circuit held that state law remedies applied to provide the remedy rather than federal maritime laws. The court stated that:

> By its terms, the [Jones] act is strictly limited to a certain class of plaintiffs. We believe that a state statute allowing recovery . . . would not be plainly inconsistent with federal law, nor would it frustrate Congress' scheme of compensation for seamen, when it is applied to people who fall outside the scope of the congressionally mandated scheme for maritime injuries and death.

40 F.3d at 639. This Court affirmed in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996). It was stated at the outset that the case involved a "nonseafarer" which meant a person who is neither a seaman covered by the Jones Act nor longshore workers covered by the LHWC Act. 516 U.S. at 205 n.2. This Court held that since no federal statute specified the appropriate relief to "nonseafarers", state tort remedies were applicable and were not displaced by the federal maritime laws. 516 U.S. at 215. It was stated in *Yamaha* that:

> When Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is, we have generally recognized, no cause

> for enlargement of the damages statutorily provided.

Id. The cases cited for that statement each involved traditional situations where the maritime laws were invoked by the litigant and those laws provided remedies to that litigant. This Court further stated that: "But Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters." *Id.*

Stier is a nonseafarer by this Court's definition as he is not a seaman covered by the Jones Act. Stier, however, unlike the decedent in *Yamaha*, is not covered by any federal maritime law. Congress has not "prescribed a comprehensive tort recovery regime to be uniformly applied" applicable to him. Rather, it is just the opposite. Congress has said that Stier has no claim for relief against his employer under any federal maritime law. He cannot invoke any federal statute or common law. He is entirely outside the federal maritime recovery regime.

Assuming that the federal maritime laws can in theory displace state law in this situation, the federal interests must be balanced with the state interests. The facts establish that Stier's employment relationship with Reading & Bates was centered in Texas. The applicable principle was stated as follows:

> In the years since *Jensen*, the Supreme Court has made it clear that the uniformity principle does not preclude the application of state law in admiralty. Rather, the decision whether to apply a state rule must be based upon balancing state and federal interests.

1 T. Schoenbaum, *Admiralty & Maritime Law* 142 (2d ed. 1994). It is also stated that "the courts are required to analyze the competing interests and to make a choice between federal or state concerns." *Id.* at 144. The Court is to determine "which sovereignty, federal or state, has the predominant interest in a particular matter." *Id.* at 144 n.15. Since Texas has an interest in providing a remedy to Stier in this case, the issue becomes whether or not that interest is one that states have traditionally exercised. If so, then such an interest is not displaced unless the federal statute shows that result to be the clear manifest purpose of Congress. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Maryland v. Louisiana*, 451 U.S. 725, 738 (1981); *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1416 (9th Cir. 1990), *cert. denied*, 504 U.S. 979 (1992); *Green v. Industrial Helicopters, Inc.*, 593 So.2d 634, 643 (La. 1992). States possess broad authority to regulate employment relationships. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 722, 756 (1985). They similarly have broad authority to protect lives, health and well being of persons within their jurisdiction and regulate injurious and dangerous activities. 471 U.S. at 756.

The decision below did not balance the state interests and federal interests to ascertain which had the predominant interest in the matter. Even if Section 688(b) could be taken as indicating a desire to displace the state's right to provide a forum for persons with sufficient contacts within that state, such a rule would have required a balancing of the state's interests in providing a forum with the federal interests. Since rules of venue and forum non conveniens have been traditionally left to the states by Congress and by decisions of this Court, such a rule

cannot be lightly inferred from cryptic remarks in a Committee report.

CONCLUSION

For the reasons stated if the Court grants certiorari in No. 99-558 then it should also grant this conditional cross-petition.

Respectfully submitted,

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